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## DID MILITARY JUSTICE FAIL OR PREVAIL?

*Robinson O. Everett\**

SON THANG: AN AMERICAN WAR CRIME. By Gary D. Solis. Annapolis: Naval Institute Press. 1997. Pp. xix, 299. \$29.95.

The subject of war crimes is now receiving significant attention. On March 13, 1998, the United States Senate, by a vote of 93-0, adopted a resolution urging the President to call on the United Nations to create a tribunal to indict and try Saddam Hussein for his "crimes against humanity."<sup>1</sup> In the recent past, United Nations tribunals have tried crimes against humanity perpetrated in the former Yugoslavia and in Rwanda.

With Administration backing, Congress has also recently enacted legislation intended to confer jurisdiction on the federal district courts to try certain war crimes of which American nationals are perpetrators or victims. The War Crimes Act of 1996<sup>2</sup> — which is based on the power of Congress to define and punish offenses against the law of nations<sup>3</sup> — originally concerned "grave breaches" of only the Geneva Convention of 1949; but, as later amended, it punishes violations of both the Geneva and Hague Conventions. Congress apparently intended this grant of war crime jurisdiction to federal district courts to supplement, not supersede, the jurisdiction over violations of the law of war — part of the law of nations — long exercised by American military commissions and general courts-martial.<sup>4</sup>

The War Crimes Act was prompted by the experience of a former Air Force pilot, who, after being shot down and spending several years in a North Vietnamese prison, was concerned about the seeming absence of statutory authorization for the punishment of persons who mistreat prisoners of war.<sup>5</sup> Certainly the concern

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1. S. Con. Res. 78, 105th Cong. (1998) (enacted). See *Senate Votes to Try Saddam for War Crimes*, THE NEWS AND OBSERVER (Raleigh, N.C.), Mar. 14, 1998, at A6.

2. 18 U.S.C. § 2441 (1998) (codifying the War Crimes Act of 1996, as amended by Expanded War Crimes Act of 1997).

3. U.S. CONST. art. I, § 8, cl. 10.

4. See Article 18, UCMJ, 10 U.S.C. § 818 (1994); *In re Yamashita*, 327 U.S. 1 (1946) *Ex parte Quirin*, 317 U.S. 1 (1942).

5. How the former pilot, Mike Cronin, persuaded a freshman Congressman, Walter Jones, Jr. (R, N.C.), to introduce the war crimes bill and how Jones, in turn, obtained bicameral approval of the legislation within a few months is itself a fascinating story — which

about the welfare of prisoners of war is quite appropriate — and perhaps overdue.<sup>6</sup>

Although the impetus for recent war crimes legislation has been a perceived need to assure the availability of a forum to try persons who commit war crimes against American victims, we must never overlook the possibility that Americans may perpetrate war crimes against others. The recent commemoration of the thirtieth anniversary of the My Lai Massacre, which took place on March 16, 1968, is one reminder of this possibility.<sup>7</sup> Publication of *Son Thang: An American War Crime*, Gary D. Solis's gripping account of an incident that took place almost two years after My Lai, provides another.

### DEATH COMES TO SON THANG

On the evening of February 19, 1970, a five-man patrol went out from Marine Company B of the 1/7 Battalion to search for Viet Cong activity. At the time — and later during court-martial proceedings — the patrol was referred to as a "killer team," a term that does not appear in any Marine Corps manual or instruction. According to Solis, the term was "essentially unique" to the battalion in which these five Marines were serving (p. 29). One platoon sergeant defined the concept quite simply: "They go out in small teams of four to five men and search out hamlets for weapons, rice, different types of caches, and to make contact with the enemy, and kill as many as possible" (p. 29).

Two of the Marines involved had spotty disciplinary records. Heading the killer team was Randall Dean Herrod, a part Creek Indian from Calvin, Oklahoma, who had enlisted in the Marine Corps sixteen months before. In Vietnam, Herrod had engaged in heroic conduct — including saving the life of his platoon leader, 2d Lt. Oliver L. North. He received the Purple Heart, was recommended for a Silver Star, and was promoted to lance corporal. However, apparently displeased with a transfer to the 1/7 Battalion,

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Representative Jones narrated in November 1997 during an ABA annual conference on National Security Law in Washington, D.C.

6. On April 9, 1998, the National Prisoner of War Museum was dedicated in Andersonville, Georgia, honoring the estimated 800,000 Americans who have been held as prisoners of war. According to the National Park Service, the numbers of American prisoners of war, and those who died in captivity, for the Civil War and the wars of this century was: "CIVIL WAR: approximately 462,000 Confederate prisoners held, 26,000 died; 211,000 Union soldiers held, 30,000 died. WORLD WAR I: 4,120 held; 147 died. WORLD WAR II: European Theater, 95,532 held; 1,124 died; Pacific Theater, 34,648 held, 12,935 died. KOREAN WAR: 7,140 held; 2,701 died. VIETNAM WAR: 766 held; 114 died. PERSIAN GULF WAR: 23 held, none died." See Dan Sewell, *Civil War Prison Camp Site of POW Museum*, THE CHATTANOOGA TIMES, Mar. 30, 1998, at A1.

7. Paul Alexander, *Villages, Soldiers Revisit Memories of My Lai Massacre*, THE HERALD-SUN (Durham, N.C.), Mar. 16, 1998, at A1.

he had absented himself without leave for two months. This absence resulted in a special court-martial sentence of reduction in grade to private, forfeitures of seventy dollars pay for three months, and three months of confinement. The confinement was subsequently suspended.<sup>8</sup>

Pvt. Michael A. Schwarz — a twenty-one-year-old from rural Pennsylvania who was the oldest member of the killer team — had been in Vietnam for four months, but had been in his current battalion for less than a week. In his prior unit, Schwarz had disciplinary problems and had been considered for administrative discharge because of “unfitness” (p. 38). It is not uncommon — although not often admitted — to transfer disciplinary problems to other units. Schwarz, who in his prior unit had participated in several reconnaissance patrols, was the killer team’s point man, slightly ahead of his comrades (pp. 37-38).

The other three members of the team had not previously been in trouble as Marines. Pfc. Thomas R. Boyd and Michael S. Krichen were both nineteen. Boyd had been a member of the 1/7 Battalion since August 1969 and had experienced heavy combat activity in Vietnam. Krichen’s record was almost identical; he had joined the 1/7 Battalion within four days of Boyd, from which time “they had served in the same fire team of the same squad of the same platoon” (pp. 38-39). Eighteen-year-old Pfc. Samuel A. Green, Jr., the only African American on the killer team, had arrived in Vietnam less than a month before, and this was his first patrol. Green and Boyd had pre-enlistment problems as juveniles; Green had spent twenty-three months in a juvenile facility. However, none of the men had experienced disciplinary problems while in the service (pp. 38-40).

Son Thang 4 was a small hamlet on the boundary of a free-fire zone — a geographic area “designated by the South Vietnamese government as pre-approved for the employment of military fire and maneuver because they were ostensibly free of Vietnamese civilians” (p. 40). From Hill 50, where the members of the “killer team” were located, it was only a few hundred yards to Son Thang, but it took about half an hour for the team to cover this distance.

As the patrol came to a group of the village’s rough, thatch-roofed huts — generally referred to by the Marines, and many others, as “hooches” — Schwarz, acting at Herrod’s direction, entered one and found it empty. The team turned their attention next to another hooch about twenty-five yards away. Surrounding it, they called to those inside to come out. Four Vietnamese emerged — a fifty-year-old woman, a twenty-year-old woman (who was

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8. Pp. 36-37. Although Herrod and everyone else thought of him as a “private” on February 19, 1970, his reduction from lance corporal took effect a few days later. P. 37.

blind), a sixteen-year-old girl, and a five-year-old girl. Schwarz went inside to search and found no one there. At about this time, Herrod shot one of the women and then, according to some accounts, gave orders to kill all of these Vietnamese. All four females were killed by point-blank firing (pp. 44-45).

As they moved back towards the hooch Schwarz had first entered, the killer team heard voices from inside. This time Schwarz found six Vietnamese women and children, and they were ordered out. All were killed, apparently upon orders of Herrod. The dead were a forty-three-year-old woman, a twelve-year-old boy, two ten year-old girls and two little boys — one five and the other three years old. Next the five Marines moved to a third hooch. This time six more Vietnamese were killed — again all women and children (pp. 46-47).

Marines at the team's nearby home base heard loud bursts of gunfire and were concerned about the patrol's welfare. However, in response to radio inquiries, the killer team reported that they had some confirmed enemy KIAs — killed-in-action. A few minutes later when they arrived back at their unit, Herrod and some other members of the patrol recounted at an initial debriefing that they had spotted some Viet Cong, set up a hasty ambush, and killed at least six of the enemy (pp. 49-50).

Lt. Louis R. Ambort, the company commander of the five Marines, apparently initially accepted the account they provided. But later — prodded by questions from Maj. Richard Theer, his battalion operations officer and an exemplary Marine — Ambort became suspicious and further questioned the members of the team. Now they told him that they had killed a number of women and children after being fired upon by their victims. This explanation satisfied him for the moment. Theer, however, was not satisfied. The next day, a patrol sent to Son Thang found the bodies of sixteen women and children. Theer began his own initial investigation and eventually obtained statements from the members of the killer team that made it appear likely that serious crimes had been committed.<sup>9</sup>

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9. Pp. 51-56, 59-64. As Solis points out, commentators have differed as to whether the murder of hundreds of Vietnamese noncombatants by Army troops at My Lai was a *war* crime. Maj. Gen. George S. Prugh, the Judge Advocate General of the Army, expressed the view that the victims, citizens of an allied nation, South Vietnam, were not enemies protected under the Geneva Conventions and that their murders were like other homicides involving citizens of a host nation. P. 57. Telford Taylor, a chief prosecutor at Nuremberg, expressed the contrary view that, since My Lai was considered to be controlled by the Viet Cong with enemy resistance to be expected, it was "hostile territory" within the meaning of the Hague Convention and that the laws of war applied. *Id.* A similar issue could be raised as to the homicides at Son Thang — which was located only about twenty-five miles from My Lai. The members of the killer team believed that they were killing enemies, however, and perhaps their belief should be the governing consideration.

As a result of Maj. Theer's investigation, members of the killer team were charged with the murder of sixteen noncombatants in violation of the Uniform Code of Military Justice. After a formal pretrial investigation pursuant to Article 32 of the Code,<sup>10</sup> military judge Maj. Robert Blum<sup>11</sup> recommended that all five killer team members be tried by general court-martial on charges of premeditated murder.<sup>12</sup>

### THE TRIALS

Pfc. Krichen was never tried. Following a time-honored defense tactic, his military counsel negotiated immunity in return for an agreement to testify truthfully (p. 89). Krichen, the only member of the killer team without prior civilian or military convictions, had not been in charge and by all accounts had been less involved in the killings than Herrod or Schwarz. Thus, he was an especially suitable candidate for a deal; certainly from the prosecutor's standpoint it was helpful to have an eyewitness — particularly one whose testimony would not require an interpreter.

The charges against the other four accused were referred for separate trial, rather than a joint trial (p. 107). This choice seems understandable, since separate trials would probably be simpler for the judge and prosecutor, as well as less confusing for the triers of fact. Moreover, a joint trial would have presented issues as to the admissibility and use of the incriminating statements made by the various accused.<sup>13</sup> In separate trials the statements made by each

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10. 10 U.S.C. § 832 (1994). Unless waived by an accused, a pretrial investigation under Article 32 of the UCMJ is a prerequisite for trial by a general court-martial. Unlike a grand jury, its proceedings are open, the accused is represented by counsel, and the defense has a right to cross-examine government witnesses and present its own evidence. See 10 U.S.C. § 832(b) (1994). However, even if the pretrial investigating officer recommends against trial, this recommendation is not binding on the commander who convenes a general court-martial. See 10 U.S.C. § 832, 834 (1994).

11. Maj. Blum had also been the military judge who tried Herrod for his unauthorized absence. P. 36.

12. Lt. Ambort, company commander of the killer team members, was separately charged with failure to obey a division order to report any incident thought to be a war crime; dereliction of duty for failing to take effective measures to minimize noncombatant casualties and not ensuring that his men were aware of the rules of engagement; and making a false official statement as to one matter concerning the killer team's activities. P. 91. These charges were investigated under Article 32 by Lt. Col. James P. King — who years later served as the senior Marine judge advocate. Pp. 93, 100. King recommended nonjudicial punishment for Lt. Ambort for making a false official statement. P. 102. In accordance with this recommendation, Ambort received a letter of reprimand — which inevitably has a very adverse effect on the career of a Marine officer — rather than facing trial by general court-martial on some theory that, as commander of the members of the killer team, he bore responsibility for the sixteen murders.

13. Cf. *Bruton v. United States*, 391 U.S. 123 (1968).

accused could be received against that accused without a limiting instruction.<sup>14</sup>

The first trial was that of Pfc. Schwarz. This accused, whose IQ was far below average, was among Marines who had been enlisted under relaxed recruiting standards then in effect in the Armed Services.<sup>15</sup> From the beginning, the trial did not go well for him. Schwarz was represented by military counsel who unsuccessfully made several pretrial motions, including one contesting the admissibility of Schwarz's pretrial statement.<sup>16</sup> Especially damaging, however, was the testimony of Krichen. He swore that he had seen Schwarz personally participate in killing Vietnamese at the first and third hooches. However, on cross-examination, some of Krichen's answers tied in with a defense that Schwarz was only following orders (pp. 141-44).

The company commander, Lt. Ambort, testified for the defense as to the hazards posed to the Marines by Vietnamese civilians — even those nine to twelve years old. According to Ambort, his "company policy" was to "[t]reat [noncombatants] with the utmost of suspicion, but make sure, you know, protect them as well as you can" (p. 148). With this and other testimony, the defense sought to suggest that the Son Thang victims were not necessarily innocents.

Schwarz himself took the stand — partly in order to explain his incriminating pretrial written statement. His testimony suggested that to some extent his shooting of the civilians had been a response to a directive to the killer team from their leader, Pvt. Herrod. Subsequently, in a forceful argument, military defense counsel contended that Schwarz had been acting under a perceived duty to obey an order from the leader of the patrol (pp. 158-64).

The members of the general court-martial received detailed instructions from the military judge on such matters as aiding and abetting, mistake of fact, extent of any duty to obey illegal orders, testimony of an accomplice, and presumption of innocence. After deliberating, the officers composing the court-martial found

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14. An enlisted defendant is tried by a general court-martial composed solely of officers, unless the defendant exercises the statutory right to request that at least one-third of the court-martial members be enlisted persons. See Article 25(c)(1), UCMJ, 10 U.S.C. § 825(c)(1) (1994). Thus, if there are two defendants, and either submits a request for enlisted members, that defendant will be tried by a court with some enlisted members and the co-defendant will be tried separately by an all-officer court. Consequently, a defendant can obtain a severance from a co-defendant by requesting enlisted members.

15. Pp. 108, 116. In October, 1966, the Department of Defense directed that 100,000 persons with "category four" intelligence be enlisted annually — even though some better qualified volunteers would have to be turned aside to meet this quota. The effect of "Project 100,000" on discipline was harmful. See pp. 116-18.

16. Under Article 31 of the Uniform Code, pretrial warning requirements are imposed which go far beyond those required by *Miranda*. See 10 U.S.C. § 831 (1994). One issue concerned compliance with Article 31 in taking Schwarz's statement which the government offered.

Schwarz guilty of premeditated murder of the twelve Vietnamese at the second and third hooches.<sup>17</sup> A sentence of life imprisonment was then imposed (p. 185).

Pfc. Boyd, whose trial commenced soon after that of Schwarz, was also a Project 100,000 recruit. However, unlike Schwarz, the charges against him were for unpremeditated, rather than premeditated, murder.<sup>18</sup> Moreover, unlike Schwarz, he was represented not only by a Marine lawyer but also by a civilian attorney — Howard Trochman, who was from Boyd's hometown, Evansville, Indiana, and was an avowed critic of the Vietnam War. Trochman neither asked nor received compensation for his representation, and he even paid his own expenses (pp. 189-91).

Lt. Col. Paul A. St. Amour, the military judge who had tried Schwarz, was also to preside over Boyd's trial. From his observation of St. Amour during the preceding trial and his evaluation of the attitude of typical court-martial members, Trochman decided to gamble on a trial by judge alone (p. 192).

The Government case was much the same as in the trial of Schwarz. However, Krichen, who was a close friend of Boyd, offered testimony indicating that the accused had fired over the head of the civilians and had consciously avoided killing any of them. Furthermore, Boyd's own testimony that he had religious convictions against killing and had not fired at the Vietnamese was corroborated by others. Because of a reasonable doubt as to Boyd's guilt, the military judge acquitted him of all charges (pp. 196-99).

On August 13, 1970, seven weeks after Boyd's acquittal and less than six months after the killings, Pfc. Green's trial began for sixteen unpremeditated murders. His military defense counsel offered the defense that Green had not actually shot anyone and that, with no combat experience before the Son Thang incident, he was too junior and inexperienced to be considered an aider and abettor. Green decided to exercise his statutory right to have enlisted members of his court-martial and, after challenges had been exercised, he was tried by a court-martial with three officer members and two senior noncommissioned officers. Lt. Col. St. Amour was again the military judge. Rather than seeking to show that Green personally killed anyone, the prosecutor focused on showing that Green

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17. P. 183. Schwarz was not, however, found guilty of the first four murders. In a general or special court-martial, findings of guilt require only a two-thirds vote, rather than unanimity. See Article 52, UCMJ, 10 U.S.C. § 852(a)(2) (1994).

18. Maj. Blum had recommended that all five members of the killer team be tried for premeditated murder. While this recommendation was followed with Schwarz and Herrod, p. 225, Boyd and Green were charged only with unpremeditated murder. Pp. 194, 206. Although Solis does not explain the reason for this difference in the gravity of the charges, it is consistent with the differences in the roles of the five Marines. Schwarz was the leader of the killer team, and Herrod, the point man, was more directly linked with the killings than either Boyd or Green.



shared in the criminal purpose and thus was liable as an aider and abettor. Krichen's testimony that Green had fired at all three hooches supported this theory (pp. 204-08).

The defense emphasized, on the other hand, that Herrod and Schwarz had been the primary actors and Green had been in the background. Green, testifying in his own defense, maintained that although he had fired, he purposely aimed to miss and that he had been acting only upon the repeated orders of Herrod, whom he believed to be an experienced leader (p. 207). The military judge's instructions basically followed those given in the trial of Schwarz.<sup>19</sup> The members of the court-martial found Green guilty of fifteen counts of unpremeditated murder. The sentence adjudged by the members was five years confinement and a dishonorable discharge.<sup>20</sup> Green believed the sentence to be excessive. However, to others — including myself — it appears remarkably lenient. In this instance, as Solis agrees, any effort to portray Green, the only African American on the "killer team," as a victim of racial bias would lack foundation in fact (pp. 210-12).

The case of Pvt. Herrod, the last to be tried, aroused great interest in his home state of Oklahoma, and 160,000 citizens signed a petition in his behalf that was sent to the Commandant of the Marine Corps (pp. 217-18). Like Boyd, Herrod received uncompensated representation, from experienced Oklahoma civilian attorneys.<sup>21</sup> Additionally, 1st Lt. Oliver North, whose life Herrod had saved, assisted the defense team in every way possible. Meanwhile, Lt. Col. St. Amour had been unexpectedly transferred to Japan; and Navy Commander Keith Lawrence was sent from the Philippines to act as military judge for Herrod, who was charged with sixteen premeditated murders. Herrod was tried by a panel of seven officers — a colonel, a lieutenant colonel, four majors, and a captain<sup>22</sup> — all of whom had combat experience. In North's view,

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19. As Solis notes, the defense counsel failed to request an instruction on accomplice testimony — despite being almost invited by the judge to do so. P. 179. He offers no explanation for this omission, and none readily occurs to me.

20. In a court-martial, if the members of the court-martial decide on guilt or innocence, they also adjudge the sentence. *See* Article 52, UCMJ, 10 U.S.C. § 852(b) (1994). There is no way for a servicemember to have the members determine guilt and the judge adjudge sentence. I have strongly urged a change of the Uniform Code in this regard.

21. Denzil D. Garrison, Republican leader of the Oklahoma state senate, was defending the nephew of a man who had helped save his life during the Korean war. He recruited Gene Stipe, a Democratic state senator, who was a seasoned defense attorney with some prior military trial experience. Each lawyer paid his own way to Vietnam. Later, there were two other Oklahoma volunteers. Pp. 218-20.

22. The panel had originally consisted of eight members, but a lieutenant colonel had been challenged. P. 229. In a general court-martial, the Government and the defense each have a peremptory challenge. Although Solis does not state specifically that the member was removed by a defense challenge, I assume this occurred because this would be consistent with the "numbers game" played by counsel in general courts-martial. Since a finding of guilty

this was advantageous to the accused, because “only men who had served in combat could appreciate the pressures that Herrod must have been under” (p. 229).

Krichten’s testimony was detailed and damaging to Herrod. In a 1996 letter to Solis, defense attorney Garrison referred to the Government’s presentation as a “sophomoric prosecution.”<sup>23</sup> However, Solis’s recital of Krichten’s testimony suggests to me a contrary conclusion. In any event, the defense countered with evidence about extensive Viet Cong activity in the Son Thang area a few days before and even evidence suggesting that the patrol itself had been fired upon. Herrod’s former battalion commander testified for the defense as to the difficult situation in which the members of the patrol found themselves. Oliver North, who had paid his own way to Vietnam to testify for Herrod, was an effective character witness.

Herrod, whose military intelligence test scores were quite high, also testified effectively on his own behalf. According to him, there had been some enemy fire, which his team had returned; and some civilians were killed in the crossfire. He asserted in his defense, “I do not now, and I did not then, feel that I had killed anyone it wasn’t necessary to kill” (p. 245). Thereafter, Dr. Hayden Donahue, a prominent Oklahoma psychiatrist, and an expert on battle fatigue among World War II veterans, gave his opinion that Herrod probably was suffering from this condition at the time of the killings. Having been in extensive combat and faced death on a daily basis, Herrod’s reasoning had been supplanted by instinct.<sup>24</sup>

After brief rebuttal evidence, the case was presented to the members of the court-martial. Apparently they were greatly impressed by the skill of the defense team and, on the other hand, considered the Government’s case to be weak. Since there was less than the necessary two-thirds vote to convict of premeditated murder, the panel considered lesser included offenses and decided on an acquittal across the board.<sup>25</sup> Solis poses the question of whether jury nullification had been operative (p. 256).

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must be rendered by a two-thirds vote, the mathematical odds favor an accused tried by seven members than by six or nine; challenges are often exercised with this in mind.

23. Letter from Denzil Garrison to Gary Solis (Jan. 4, 1996).

24. Solis expresses well-grounded doubt that the doctor correctly arrived at his diagnosis of battle fatigue. Pp. 247-48.

25. Pp. 253-55. Solis — apparently on the basis of interviews conducted many years later with some of the court members — recounts that initially the vote was four to three on the premeditated murder charge, although memories differed as to whether the majority was for conviction or acquittal. “Unaccountably, as the seven officers considered the lesser offenses, the vote swung not toward conviction of a less serious charge, as one would expect, but more strongly toward acquittal.” Pp. 254-55.

## THE AFTERMATH

In September 1970 — shortly after his acquittal — Herrod returned to the United States for out-processing from the Marine Corps. His twenty-two months as a Marine had included fifteen months in Vietnam, including two months of unauthorized absence and six months of pretrial confinement. In December 1970, he finally received the Silver Star for which he had been recommended long before. Around the same time, Krichen and Boyd both completed their Vietnam tours of duty and were honorably discharged. Schwarz and Green were transferred to a naval prison in Portsmouth, New Hampshire to serve their respective sentences.

During the Vietnam War twenty-seven Marines were convicted of murder and other crimes against civilians, and only in seven cases was confinement adjudged for less than ten years. Schwarz's life sentence was not unusually severe but Green's sentence was remarkably lenient.<sup>26</sup> It was the task of Maj. Gen. Charles F. Widdecke, the commanding general of the First Marine Division who had convened the four general courts-martial, to review the Schwarz and Green convictions. In light of Herrod's acquittal, Widdecke's staff judge advocate — his legal advisor — recommended that Schwarz's sentence be reduced to twenty years confinement. Displaying extraordinary leniency toward a Marine convicted of fifteen premeditated murders, the general reduced the confinement from life to one year. He similarly reduced Green's sentence. Thereafter, the Navy Court of Military Review affirmed the findings of guilt and the reduced sentences. Both Schwarz and Green received dishonorable discharges.

Subsequently, the convictions and sentences, as reduced, of Schwarz and Green were affirmed on appeal. No clemency was granted either accused by the Navy Discharge Review Board — which could have changed the characterization of the dishonorable discharge. Later, James H. Webb, who had been a contemporary of Oliver North at the Naval Academy and also served as a Marine officer in Vietnam, took a great personal interest in Green's case and helped present it to the Board for Correction of Naval Records.<sup>27</sup> In 1978, that Board changed Green's dishonorable discharge to a general discharge — which, although not an "honorable discharge," is "under honorable conditions." Green never learned of this partial vindication because in 1975 he had killed himself af-

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26. The sentences adjudged against the twenty-seven Marines were not extraordinary when compared with sentences of civilian courts for similar misconduct. Pp. 266-68.

27. Pp. 283, 289. Webb, who in 1978 authored *Fields of Fire*, a book based on his experiences in Vietnam, at a later time became Secretary of the Navy. Pp. 287-88. See JAMES H. WEBB, *FIELDS OF FIRE: A NOVEL* (1978).

ter unsuccessfully seeking to attack his court-martial conviction collaterally in a federal district court (p. 291).

### CONCLUSIONS

Solis's qualifications to write *Son Thang* are unique. He served in the Marine Corps for twenty-six years, including two tours of duty in Vietnam as an assault amphibian officer — the first in 1964 as a platoon leader and the second in 1966 as a company commander. Subsequently, after becoming a lawyer, he served for more than eighteen years as a judge advocate, tried more than 450 cases as chief prosecutor for the First and Third Marine Divisions, and later served two terms as a general court-martial judge before retiring as a lieutenant colonel in 1989. His 1989 book, *Marines and Military Law in Vietnam*, is an excellent history of Marine Corps courts-martial in that conflict (pp. xii-xv).

Probably as a result of his own unique experience, Solis does a remarkable job of providing his readers an understanding of the mental processes of the five members of the killer team. His account of the investigation that was undertaken makes clear that — at least in some instances — commanders and military lawyers are willing to unearth and disclose the possible existence of embarrassing war crimes perpetrated by American servicemembers.<sup>28</sup> His explanation of the American military justice system is understandable and free of military jargon. His insights into the tactics of both prosecutors and defense counsel are excellent.

Solis concludes that although the Son Thang “trials were reminders of humanity’s aspiration to do justice,” on a more basic level “the Son Thang trials were a failure” (p. 293). The results of the trials show that the military justice system carried out its prosecutorial function “deficiently, its effort wanting in several significant respects” (p. 293). In his view, the potential significance of the suspected offenses was such that Marine lawyers should have been involved initially in taking the statements of the killer team and of other potential witnesses. The absence of this participation created a significant risk that the statements obtained would be held inadmissible at trial — and indeed some statements were objected to, although unsuccessfully. Solis also believes that more experienced lawyers should have been assigned to both prosecute and defend the general courts-martial arising out of Son Thang. He writes, “If the 1st Division lacked the requisite specialists, then

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28. Maj. Robert Blum, who conducted the pretrial investigation of the Son Thang killings, later served as a military judge in the Marine Corps and retired as a colonel. P. 76. In 1957, Blum was my student in a military law seminar at the U.N.C. School of Law, and I had a great respect for his ability and seriousness of purpose. I was pleased that my favorable impression then is confirmed by Solis’s account of the pretrial investigation Blum conducted.

prosecutors, defenders, and administrators sufficient to the task should have been brought to Hill 327 from other in-country commands, even from state-side commands, if necessary. It had been done before when multiple homicides were to be tried" (p. 294). Solis criticizes the prosecution for granting Krichen immunity too quickly and then not adequately monitoring him.<sup>29</sup> Finally, Solis notes the question raised by some experienced judge advocates as to whether the military justice system can function effectively under wartime conditions in places like Vietnam (p. 296).

Without being Pollyannish, I must express my own view that under the circumstances the military justice system worked remarkably well at Son Thang — especially when one considers that the Military Justice Act of 1968 had made major changes in the system only a few months before the Son Thang killings and that those changes were still being assimilated. Admittedly, any prosecutorial decision to grant immunity — either testimonial or transactional — to a co-accused has a potential for inequity; but I am hesitant to criticize the choice made to immunize Pfc. Krichen.<sup>30</sup> I also do not criticize the prosecution's use of separate trials. Separate trials, rather than a joint trial, do create additional administrative burdens for the prosecution and permit defense counsel in the later cases to learn from the mistakes of their predecessors. However, in this instance I believe the use of separate trials was a wise choice — especially since any accused could have obtained an automatic severance by exercising his statutory right to have enlisted members on his court. Moreover, the wisdom of the choice to try Schwarz first was confirmed by his conviction of twelve premeditated murders and the life sentence the court-martial handed down.<sup>31</sup>

Although the success of the civilian counsel in obtaining acquittals for Boyd and Herrod would suggest the wisdom of utilizing the services of such attorneys — especially if rendered at the attorney's own expense — I would not infer that the military lawyers who prosecuted were simply outmatched. For example, even in a case involving a war crime, the accused usually has not been recommended for a Silver Star and cannot call as a character witness someone — in this instance Oliver North — whose life he has saved

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29. P. 295. Moreover, Solis would have referred to trial the charges against Lt. Ambort on the premise that this company commander "like Lieutenant Calley's superior, Captain Medina, should have been made to account for his actions. If, like Medina, he be acquitted, so be it." Pp. 295-96.

30. Admittedly, at Boyd's trial the prosecutor — a different prosecutor from the one who tried Schwarz — was apparently surprised by Krichen's favorable testimony to his good friend Boyd; and perhaps this reflected inadequate preparation. Pp. 196-97. However, if a prosecutor tries to control an immunized witness — which Solis seems to suggest be done — this tactic may give rise to persuasive defense complaints.

31. Presumably, these favorable results would have strengthened the Government's hand for plea-bargaining purposes.

in combat. Moreover, that psychiatric testimony on battle fatigue might create a doubt as to the mens rea of an accused should not be too surprising in an era when acceptance of the abuse excuse is not uncommon.

In short — with the possible exception of General Widdecke's extraordinary reduction in Schwarz's sentence from life imprisonment to one year of confinement — I would not view the outcome of the Son Thang trials as examples of "so-called military justice."<sup>32</sup> Instead the results fall within the wide range not uncommon for contested cases in many contemporary systems of justice. Certainly, none of these trials could be unfavorably compared with that of O.J. Simpson. Of course, I do not want to suggest that the military justice system was flawless — whether in 1970 or today. Many improvements have been made in the interval; and others are probably needed.<sup>33</sup> For example, in combat areas some streamlining of military justice might be appropriate to conserve resources.<sup>34</sup>

The most important achievement of Solis's *Son Thang*, however, is to make clear that Americans in uniform, like soldiers from other countries, may commit war crimes. In most instances, as in the trials at Son Thang, the offenses committed will not be charged as *war crimes* — that is, the accused will not be prosecuted under provisions dealing with violations of the law of war based on congressional power under Article I, section 8, clause 10. Instead, where servicemembers on active duty are involved, the charges will be preferred under routinely used articles of the Uniform Code of Military Justice — such as Article 118, 10 U.S.C. § 918 (murder), or Article 120, 10 U.S.C. § 920 (rape)<sup>35</sup> — which rely on congressional power "[t]o make Rules for the Government and Regulation of the land and naval Forces."<sup>36</sup> Regardless, however, of the charge that might be preferred or of the court, military or civilian, that might try the case, it is important that Americans be constantly aware that our own servicemembers have committed war crimes in the past

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32. Justice Douglas's opinion for the Court in *O'Callahan v. Parker*, 395 U.S. 258, 266 n.7 (1969), *overruled by Solorio v. United States*, 483 U.S. 435 (1987), refers to "so-called military justice." To me, this description seems unfair.

33. For example, I have already noted that in my opinion the Uniform Code should be modified to allow the accused an opportunity to obtain a result available in any federal criminal trial — namely, trial by jury (court-martial members) and sentencing by judge. *See supra* note 20.

34. Perhaps special courts-martial — which can impose punishments of up to six months confinement, partial forfeitures of pay, reduction in grade, and a bad conduct discharge — could be conducted by a military judge alone, rather than requiring the assembling of court members.

35. However, under the "offenses not capital" clause of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934 (1994), a servicemember could be tried by a court-martial for a violation of the War Crimes Act.

36. U.S. CONST. art. I, § 8, cl. 14.

and may commit them in the future. This awareness will in turn generate efforts by the armed services to screen recruits,<sup>37</sup> to educate servicemembers about conduct that might constitute a war crime, and to explain to them that the defense of obedience to superior orders will not be available with respect to actions that should reasonably be perceived to be war crimes.

*Son Thang* is a well-conceived and well-executed explanation of an important event in recent American history. Readers of the book will obtain a much better understanding of what conduct may constitute a war crime and of the difficulties in successfully prosecuting alleged war criminals.

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37. Solis points out that two members of the killer team had scored very low in mental tests and probably would never have been recruited under the standards usually applied by the Armed Services. Pp. 116-18. However, it is sobering to recall that Herrod, who led the team, had a substantially above-average grade on his military intelligence test.